



October 14, 2021

SUBMITTED VIA EMAIL AND FOIA ONLINE

FOIA Officer
U.S. Environmental Protection Agency – Region II
290 Broadway, 26th Floor,
New York, NY 10007-1866
r2foia@epa.gov

RE: Freedom of Information Act Request Re: Construction of liner at AES-PR's coal-fired power plant in Guayama, Puerto Rico

Dear Freedom of Information Act Officer:

This is a request for information on behalf of Earthjustice and Comité Diálogo Ambiental, Inc. (collectively “Public Interest Groups”) pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and the U.S. Environmental Protection Agency’s (“EPA”) FOIA regulations, 40 C.F.R. § 2.107. This request is focused on EPA (EPA headquarters and EPA Region 2) records concerning the construction of a liner at the AES Puerto Rico, L.P. (“AES-PR”) coal-fired power plant located in Guayama, Puerto Rico pursuant to the “Disposal of Coal Combustion Residuals from Electric Utilities Rule” rule (the “CCR rule”).

The Public Interest Groups also request that EPA waive the fee that it would otherwise charge for search and production of the records requested herein, as “disclosure of th[is] information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester[s].” 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l).

I. Records Requested

The Public Interest Groups request all of the following records in the possession, custody, or control of EPA (EPA headquarters and EPA Region 2) that were created, stored, or received since January 1, 2019:

- (1) all records created, stored, or received by any EPA staff (EPA headquarters and EPA Region 2) concerning the proposed, planned, or approved liner to be constructed under the “AGREMAX Staging Area” at AES-PR’s Guayama plant;
- (2) all records reflecting or pertaining to any meetings, telephone conversations, emails, or any other communications between EPA (EPA headquarters and EPA Region 2) and

representatives of AES-PR concerning the proposed, planned, or approved liner to be constructed under the “AGREMAX Staging Area” at AES-PR’s Guayama plant; and

(3) all records reflecting or pertaining to any meetings, telephone conversations, emails, or any other communications between EPA Region 2 and EPA HQ or any other EPA office; the Puerto Rico Permits Management Office; and/or the Puerto Rico Department of Natural and Environmental Resources concerning the proposed, planned, or approved liner to be constructed under the “AGREMAX Staging Area” at AES-PR’s Guayama plant.

For purposes of this request, the term “records” is used to mean anything denoted by that word or its singular form in the text of FOIA. In particular, the term includes, but is not limited to, documents (handwritten, typed, electronic or otherwise produced, reproduced, or stored), letters, e-mails, facsimiles, memoranda, correspondence, notes, databases, drawings, graphs, charts, photographs, minutes of meetings, electronic and magnetic recordings of meetings, and any other compilation of data from which information can be obtained.

We remind you that FOIA requires that you respond within 20 working days of your receipt of this request, *see* 5 U.S.C. § 552(a)(6)(A)(i); 40 C.F.R. § 2.104, and that that response must “at least indicate within the relevant time period the scope of the documents [you] will produce and the exemptions [, if any, you] will claim with respect to any withheld documents.” *Citizens for Responsibility & Ethics in Washington v. F.E.C.*, 711 F.3d 180, 182-83 (D.C. Cir. 2013).

We ask that you disclose this information as it becomes available to you without waiting until all of the communications and records have been assembled for the time period requested. The Public Interest Groups request electronic copies of the records whenever possible.

II. Claims of Exemption from Disclosure

If you regard any documents as exempt from required disclosure under the Act, please exercise your discretion to disclose them nevertheless. *See* Memorandum from the Attorney General to Heads of Executive Departments and Agencies (Mar. 19, 2009) (“[A]n agency should not withhold information simply because it may do so legally. I strongly encourage agencies to make discretionary disclosures of information. An agency should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption.”), *available at* <http://www.justice.gov/ag/foia-memo-march2009.pdf>.

Should you determine that any records may be withheld under FOIA’s narrow exemptions, please identify each allegedly exempt record in writing, provide a brief description of that record, and explain the agency’s justification for withholding it. If a document contains both exempt and non-exempt information, please provide those portions of the document that are not exempted from disclosure. Finally, if a document does not exist, please indicate that in your written response.

III. Fee Waiver

Pursuant to 5 U.S.C. § 552(a)(4)(iii) and 40 C.F.R. § 2.107(l), the Public Interest Groups request that EPA waive all fees associated with responding to this request because the groups seek this information in the public interest and will not benefit commercially from this request. If EPA does not waive the fees entirely, the Public Interest Groups request that it reduce them to the extent possible.

FOIA provides that fees shall be reduced “if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”¹ EPA’s FOIA regulations contain an identical requirement.² Here, the request satisfies the criteria that the U.S. Department of Justice (DOJ) has identified (and the D.C. Circuit and other courts rely on) to assess whether a requester is entitled to a waiver of fees under FOIA.³

A. Public Interest Factor

First, the disclosure of this information is in the “public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government.”⁴ The request complies with EPA regulations and each of the criteria DOJ has identified for the public interest factor.

i. The request concerns the operations or activities of the government.

The Public Interest Groups seek information related to the construction of a liner under the “AGREMAX Staging Area” located at AES-PR’s Guayama plant pursuant to EPA’s CCR rule. Since EPA is an arm of the federal government, there is no question that the requested records concern “operations or activities of the government.”⁵

ii. The disclosure is “likely to contribute” to an understanding of government operations and activities.

¹ 5 U.S.C. § 552(a)(4)(A)(iii).

² 40 C.F.R. § 2.107(l).

³ See, e.g., Stephen J. Markman, U.S. Dep’t of Justice, FOIA Update, Vol. VIII, No. 1, New Fee Waiver Policy Guidance at 3-10 (1987), *available at* http://www.justice.gov/oip/foia_updates/Vol_VIII_1/viii1page2.htm; *Judicial Watch, Inc. v. U.S. Dep’t of Justice*, 365 F.3d 1108, 1126 (D.C. Cir. 2004) (stating that “for a request to be in the ‘public interest,’ four criteria must be satisfied,” and citing agency’s multi-factor fee waiver regulation).

⁴ See 40 C.F.R. § 2.107(l).

⁵ See 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l).

The requested records are “likely to contribute” to an understanding of the operations or activities described above because these documents are not otherwise in the public domain and are not accessible other than through a FOIA request.⁶ Given the importance of the CCR rule and its impact on public safety and the environment, the records requested should be made available to the public. The documents requested are “meaningfully informative” and “likely to contribute” to a greater understanding of EPA’s operations and activities with respect to the Agency’s obligations under the CCR rule. Among other things, the requested records, bear on what communications EPA has had with both governmental and non-governmental parties concerning AES-PR’s obligations under the CCR rule.

iii. The information will contribute to the understanding of the general public.

This information will contribute to the understanding of the general public.⁷ The general public is already following issues related to pollution from AES-PR’s Guayama plant, which has frequently been the focus of investigative reports by members of the media.⁸ Thus, the non-public records concerning this topic that the Public Interest Groups are requesting will receive close and critical scrutiny from members of the public and the news media.

The Public Interest Groups are particularly able to ensure that the information requested will be disseminated to the general public.

Earthjustice is a non-profit public interest law organization dedicated to protecting the magnificent places, natural resources, and wildlife of this earth, and to defending the right of all people to a healthy environment.⁹ Earthjustice has a longstanding interest and expertise in EPA’s CCR rule. Earthjustice has been a principal author of hundreds of pages of comments submitted to the Agency concerning the rule. For nearly a decade, Earthjustice has organized and participated in meetings with EPA on this issue, filed rulemaking petitions, attended public hearings, testified before congressional committees, published reports, and brought lawsuits relating to the rule. Earthjustice maintains a webpage solely devoted to coal ash at www.earthjustice.org/coalash, and Earthjustice routinely uses this webpage to disseminate information. The webpage has links to many EPA documents concerning coal ash, contains a biweekly blog on coal ash written by Earthjustice staff, and posts links to numerous reports on coal ash written by Earthjustice and others. Earthjustice has extensive outreach tools to publicize information received from FOIA requests, including its monthly electronic newsletter, which serves approximately 223,000 subscribers, and an active e-mail list of approximately 2 million

⁶ See *id.*

⁷ See 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l).

⁸ See, e.g., Syra Ortiz-Blanes, Miami Herald, *Toxic chemicals in Puerto Rican tap water linked to coal ash from energy firm, study says*, Oct. 7, 2021, available at <https://www.miamiherald.com/news/nation-world/world/americas/article254801482.html>; Austyn Gaffney, Vice News, *This Barge Capsized and Leaked a Massive Stream of Toxic Coal Ash Near Florida*, June 23, 2021, available at <https://www.vice.com/en/article/epnagz/coal-ash-florida-barge-capsize-aes-puerto-rico>.

⁹ See <http://earthjustice.org/about>.

people. Additionally, Earthjustice prints Earthjustice Quarterly Magazine, which includes feature-length articles on environmental issues and is mailed to over 100,000 supporters. Online, Earthjustice receives about 31,000 page views each month. Furthermore, over 1.2 million people have signed up for Earthjustice e-mail action alerts. Action alerts highlight environmental issues and provide opportunity for public participation, and typically, 15,000 to 20,000 individuals respond to such alerts.

Comité Diálogo Ambiental, Inc. (“CDA”) is a community environmental group composed of residents of the Municipality of Salinas and the Guayama Region, organized as a nonprofit corporation under the laws of the Commonwealth of Puerto Rico since 1997. The purposes of the organization are to promote the general welfare of the communities it serves through education and capacity building of residents concerning the adverse impacts of human activities on the ecologic balance of natural systems and the importance of restoring the environment and promoting conditions under which human beings and the environment can exist in harmony to fulfill economic, social, and other needs of present and future generations.

The Public Interest Groups have the ability to digest and quickly disseminate information gleaned from FOIA requests to the general public. The Public Interest Groups will make any newsworthy information or documents received in response to this request publicly available and will use them as the bases for reports and comments. Thus, the Public Interest Groups are uniquely well positioned to analyze and publicize the requested information.

iv. The information will contribute “significantly” to public understanding of government operations or activities.

The information sought will contribute “significantly” to the ongoing public conversation about the disposal of coal ash and pollution from coal-fired power plants.¹⁰ None of the materials we have requested are now widely known (if they have been made public at all), yet they are essential to the public’s understanding of EPA’s involvement and oversight of the construction of the liner under the “AGREMAX Staging Area” located at AES-PR’s Guayama plant and evaluating whether AES-PR has fulfilled its obligations under the CCR rule. As discussed above, the Public Interest Groups will make any newsworthy information or documents received in response to this request publicly available and will use them as the bases for public advocacy, including in any future public proceedings concerning AES-PR’s Guayama plant. Releasing this information will, thus, significantly enhance public understanding of any EPA activities concerning the Agency’s obligations under the CCR rule and public participation during any future public comment periods, congressional hearings, or other public proceedings.

B. Commercial Interest Factor

The Public Interest Groups are non-profit organizations with no commercial, trade, or profit interests in the requested information. The Public Interest Groups seek to use this information solely to inform the public and to support advocacy efforts around protecting human

¹⁰ See 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l).

health and the environment through effective CCR standards and regulations. Thus, there is no relevant commercial interest here, and the request is entirely in the public interest. *See id.*

For all of the foregoing reasons, a fee waiver is warranted here under 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107(l). If EPA does not believe that the above information is sufficient to justify a fee waiver, please contact us for further documentation before deciding upon the waiver request.

Please send the requested records by email to mozaeta@earthjustice.org or, for records not available electronically, by regular mail to Mychal Ozaeta, Earthjustice, 707 Wilshire Blvd., Suite 4300, Los Angeles, CA 90017. If you find that this request is unclear in any way, please do not hesitate to contact me by email or phone at (213) 766-1069.

Thank you for your time and assistance. We look forward to your prompt reply.

Sincerely,

/s/ Mychal Ozaeta

Mychal Ozaeta
Attorney
Earthjustice
213-766-1069
mozaeta@earthjustice.org

Submitted on behalf of:

Earthjustice
Comité Diálogo Ambiental, Inc.